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should find this part of the work useful and interesting. Too much cannot be said on professional ethics. Such works as this, together with more stringent requirements for admission to the bar in several states should help raise the moral standards of the American lawyer.

M. S. W.

American Railroad Rates. By Walter C. Noyes. Little, Brown & Co., Boston. 1905. Cloth, pages 277.

This volume contains a clear, clean cut exposition of the present railroad problem,—federal regulation of rates. In the early chapters the author, treating the basal principles of rate making, classification, tariffs, discriminations, competition and combination, and movements of rates, sets forth the evils resulting from regulation of rates by railroad officials. The last two chapters consider the expediency of governmental regulation of rates and the inadequacy of existing federal legislation.

The Interstate Commerce Commission Act in its provision for the regulation of rates is merely declaratory of the common law rule that all rates shall be reasonable. Congress has not given the commission power to complete the remedy by prescribing a reasonable rate to supersede one found to be unreasonable. *Maximum Rate Case*, 167 U. S. 512. Thus the power of the commission ceases at the vital point. The present problem, therefore, is to provide a constitutional and effectual plan for declaring authoritatively that a rate is unreasonable and also what rate should be substituted therefor. In effect, the remedies generally proposed provide that the existing law should be amended to give the present commission this latter additional power, e. g., the Esch-Townsend Bill, which has passed the House of Representatives and awaits the action of the Senate.

The author strongly opposes these proposed remedies as unconstitutional in that they confer judicial and legislative powers upon the same body. He places much reliance on the following extract from the *Maximum Rate Case*, *supra*: "It is one thing to enquire whether the rates which have been collected are reasonable—that is a judicial act—but an entirely different thing to prescribe rates which shall be charged in the future, that is a legislative act." In passing it is well to note that this question is still *res integra*, since the above statement is clearly *dictum*, the question before the court in that case being merely whether Congress had as a matter of fact given the existing commission power to prescribe future rates, not whether such a grant by Congress would be unconstitutional. The court said: "Our conclusion, then, is that Congress has not conferred upon the commission the legislative power of prescribing rates." (p. 512).

To avoid this constitutional objection the author proposes the following plan:

"First: A special court should be created in accordance with the constitutional provision concerning the federal judiciary. Complaints made by persons aggrieved or in their behalf by a

public official or board, that specific railroad rates upon interstate traffic are unreasonable and unjust should be presented to this court. After speedy notice to the carrier the court should summarily inquire into the reasonableness of the rates complained of. If found reasonable, the complaint should be dismissed; if found unreasonable, the court should enjoin its further collection. This would end the function of the court.

Second: In case a rate was found unreasonable all the papers in the case, together with the evidence, should be certified to the Interstate Commerce Commission, which should be empowered, upon an inspection of the papers, then to make a maximum rate to take the place of that found unreasonable by the court. The rate prescribed should remain in force a prescribed time, but should be subject to modification by the commission." (p. 255).

This scheme is ingenious and its constitutionality is beyond question. Yet, however constitutional a scheme it may be it is of no avail if impracticable. The following reasons seem sufficient to show the difficulty of a practical application of the author's scheme and to establish the necessity of conferring upon one body authority to declare that a rate is unreasonable and also what rate should be substituted therefor.

I. The second body might not have sufficient evidence before it to enable it to determine the reasonable rate. By the author's plan this body is to consider only the evidence before the first tribunal. The only question before this body being the reasonableness of the rate complained of, evidence bearing on this point only would be admissible. In case the rate complained of is palpably unreasonable it would be unnecessary for the first tribunal, in determining that the charge is unreasonable, to go through the process of determining the exactly reasonable rate. Says the author, "The courts might enjoin the collection of one dollar as an unreasonable charge. There would be no necessity for determining whether eighty or ninety cents would be unreasonable." (p 254). Evidence of the latter fact would not be essential to the former conclusion.

II. In case of a close question as to the unreasonableness of the charge it would undoubtedly be necessary for the first tribunal to adopt some standard of reasonableness for purposes of comparison. Of course a standard would have to be adopted by the second body in all cases. There is no certainty that both bodies would adopt the same standard.

Some conception of the difficulty of fixing a proper standard and of the broad field for honest differences of opinion may be had from the following language of the Supreme Court in the *Freight Association Case*, 166 U. S. 331: "What is the proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford a shareholder a fair and reasonable profit? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and as the rate

itself differs in different localities, which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or, is still another standard to be created, and the reasonableness of the charges tried by the cost of a carriage of the article and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation."

In the opinion of the author "The only way is to base charges upon ability to pay. But in measuring ability and differences in ability there is no definite rule to go by. The method is so flexible and elastic that there is much room for honest differences of opinion as to the precise point where the rate should be fixed." (p. 236). In *Tift v. Southern Ry. Co.* 138 Fed. 753, the United States Circuit Court repudiates this rule of "charging what the tariff will bear."

Even if a proper standard were agreed upon there might arise a difference of opinion regarding its application. Thus a rate declared unreasonable by the first body might be found to be reasonable by the second body.

Nor do we think the author's objection to combining these powers in one tribunal well taken. That legislative, executive and judicial functions should not be exercised by one body is a maxim of political science. It may be well to note that Montesquieu, if not the parent, the foster parent of this precept, in saying, "There can be no liberty if the power of judging be not separated from the executive and legislative powers," *Spirit of Laws*, Bk. XI C. 6, meant, as his own words indicate, especially when viewed in the light of the example before him, the English Constitution, considered by him "The Mirror of Political Liberty," that the same hands that possess the *whole* power of one department should not exercise the *whole* power of another department. Further on in this chapter he provides that the preferment of charges of impeachment and trial of the same should be in the hands of the legislature and that "the executive power should have a share in the legislature by the power of rejecting." It is unnecessary to call attention to the numerous exceptions to the maxim made by the federal and state constitutions. Besides these exceptions there are many others based on the solid ground of public convenience and practical necessity. The courts exercise legislative power in prescribing rules of procedure, evidence, etc.

Of necessity these great functions of government overlap each other and involve in their execution many incidental pow-

ers common to all, though in their intrinsic character more naturally within the scope of one department. Investigation of facts precedent to action is an essential attribute of both departments. The mere fact that the method of conducting the investigation adopted by the legislature is similar to that used by judicial tribunals does not constitute an unconstitutional encroachment upon the prerogative of the judiciary. The ultimate *purpose* for which, not the method by which, the investigation is conducted determines the character of the function exercised. The court investigates the facts to enable it to exercise its exclusive functions of applying existing rules of law and affording a remedy to the injured party or inflicting a punishment. The legislature investigates the past and present conditions to enable it to exercise its exclusive prerogative of determining the expediency of a change in the law and what particular change should be instituted. The power to determine the reasonableness of an existing rate is an incidental power necessarily common to both the legislative and judicial departments as such is merely investigation precedent to action. *W. U. Tel. Co. v. Myatt*, 97 Fed. 335, 345. As an illustration of this we may take the author's provision that, "the rate prescribed should be subject to modification." (p. 256). By whom is the fact to be determined that a modification of the rate prescribed by the commission has become necessary by reason of a change of circumstances? The author says "by the commission." This is so for the courts could not interfere unless the rate prescribed by the commission were confiscatory. When the rate "has been properly fixed, the legislature and not the courts must be appealed to for the change." *Peik v. Chicago Rd. Co.*, 94 U. S. 178. Would not the author's objection to combining the functions of the two departments apply here? It would be necessary for the commission to determine whether the rates which had been collected were unreasonable and to prescribe "rates which should be charged in the future."

C. H. H.